

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

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FILE: B-183734

DATE: SEP 17 1975

## MATTER OF:

Postal Service claim against General Services Administration for penalty mail usage during Fiscal Year 1972.

## DIGEST:

1. General Services Administration (GSA) remains indebted to Postal Service for additional \$2,037,464, representing fiscal year 1972 package mailings because reduced rate package mailing reimbursement agreement which had been made prior to fiscal year 1972 appears inconsistent with equivalent value concept under Postal Reorganization Act and record fails to clearly indicate that prior year's agreement was in fact renewed for fiscal year 1972.
2. Postal Service method of computing claim against GSA for fiscal year 1972 package mailings by applying percentages of different package sizes obtained from GSA general package mailing sampling to all 1972 package mailings is acceptable as most accurate and reasonable method available, especially because GSA provided no more accurate method of computation.

This decision responds to the request of Richard F. Gould, Assistant Postmaster General, United States Postal Service, for assistance in the collection of \$2,037,464, which the Postal Service claims the General Services Administration (GSA) owes for penalty mail usage during Fiscal Year (FY) 1972. The claim was submitted to us pursuant to 39 U.S.C. § 2601(a)(1970 ed.), which provides in part that the Postal Service may refer any matter uncollectable through administrative action to the General Accounting Office for collection.

This dispute arises under 39 U.S.C. § 3206(a)(1970 ed.), which requires Government agencies to transfer to the Postal Service out of any appropriations or funds available to them "the equivalent amount of postage due, as determined by the Postal Service, for matter sent in the mails by or to them as penalty mail \* \* \*." Penalty mail is defined at 39 U.S.C. § 3201(1970 ed.) as official mail, other than franked mail, which is authorized by law to be transmitted in the mail without prepayment of postage. The determination under 39 U.S.C. § 3206(a) of the "equivalent amount of postage due" is based on periodic samplings and estimates of agency mailings, a procedure which was followed by the former

Post Office Department under former section 39 U.S.C. § 4156(a) (1964 ed.), now recodified without substantive change as 39 U.S.C. § 3206 (a). See 36 Comp. Gen. 352 (1956). Prior to the beginning of each fiscal year, Government organizations authorized to use penalty mail are required to submit to the Postal Service an estimate of their expected mail volume for the next fiscal year. Based on the estimates, the Government organizations and the Postal Service agree upon an amount to be paid for the use of penalty mail. If changes in an agency's anticipated mail volume occur during the fiscal year the negotiated amount is adjusted.

In 1968, the Post Office Department established three size categories ("small," "large," and "odd") for package mailings under the penalty mail privilege, charging different rates on packages according to their size. The Post Office Department asked Federal agencies to supply package count estimates for the coming fiscal year by size category in advance of mailings. Because GSA was unable to obtain specific package count information by size category it proposed, and the Post Office Department accepted, a unit cost of \$1.10 per package (the then current small package regular 4th class rate) for their mailings. Similar agreements were made between the Post Office Department and GSA for Fiscal Year 1970 and 1971. For each reimbursement agreement, GSA provided the Post Office Department with projected cost estimates for GSA general package mailings and Federal Supply Service (FSS) package mailings for the coming fiscal year, based on samples from the current fiscal year, and final reimbursements were subject to adjustments at the end of the respective fiscal years based on samplings taken during those fiscal years.

Under the provisions of the Postal Reorganization Act, approved August 12, 1970, Pub. L. No. 91-375, 84 Stat. 719, the organization previously known as the Post Office Department became the Postal Service. The Postal Service commenced operations on July 1, 1971. See note preceding 39 U.S.C. § 101 (1970 ed). On June 17, 1971, GSA wrote to the Postal Service to request a renewal of the package mailing reimbursement agreement for Fiscal Year 1972. On July 6, 1971, the Postal Service sent a notice to the heads of all Government agencies, stating that all agencies should make arrangements to reimburse the Postal Service for its services at new rates, involving two adjustments: one for the period between May 16 and June 30, 1971, and the other for Fiscal Year 1972. The Postal Service restated its policy from previous years of establishing rates based on the type of mail, the size of the piece mailed, and the type of service provided, and noted that "special rates must be ... applied for."

On July 27, 1971, the Postal Service replied to GSA's June 17, 1971, request for renewal of the reduced rate reimbursement agreement. This Postal Service letter "accept(ed) your (GSA) estimated cost of \$2,000,000 as reimbursement to the Postal Service for handling the general mailings during Fiscal Year 1972, subject to adjustment for actual postage costs based on the results of your September 1971, mail sampling." Postal Service also accepted GSA's "estimated cost for handling GSA supply distribution facility mailing \* \* \*." This letter from the Postal Service did not mention the GSA request for renewal of the small package rate reimbursement agreement. Apparently sometime between July 27 and August 9, 1971, the postal revenue officer with whom GSA had been dealing made "verbal assurances" to someone at GSA that the small package reimbursement agreement would continue through Fiscal Year 1972. The Postal Service states in this regard that the postal officer in question had retired on May 31, 1971, and during the period in question he was serving only as a temporary consultant. It is not clear whether GSA had actual or constructive knowledge of this.

By letter of August 9, 1971, GSA wrote to the Postal Service to request written confirmation for Fiscal Year 1972 of the agreement which was reportedly reached with the postal officer. The Postal Service responded with a letter dated September 13, 1971. The letter stated in part as follows:

"In 1968 the package category was split into three size categories and rates were established accordingly. In your letter of September 18, 1968, copy attached, your agency advised us that you had insufficient information to determine your costs as a result of our establishing the three package categories; therefore, you proposed a unit rate for packages. Your proposal was accepted at the time and had continued in effect ever since. It is felt that there has now been sufficient time for your agency to develop adequate data on the three size categories of packages used in your mailing operations under the penalty mail system. Also, we believe that the Postal Reorganization Act requires us to obtain more realistic and prudent accounting and reporting data. We would appreciate it if your office would provide us with package data broken down by the three categories for the Federal Supply Service and your general mailings after your second mail sampling in 1972." (Emphasis supplied.)

Referring to this letter, GSA states:

"The response of the Postal Service, dated September 13, 1971, did not specifically approve or disapprove our understanding of the reimbursement agreement but clearly indicated that GSA's second mail sampling in 1972 was the time at which we must begin to break our package data into the three size categories. Based upon our established practice of using mail samplings for the current fiscal year to project the estimated costs for the coming fiscal year, we interpreted the Postal Service's letter as meaning that beginning with Fiscal Year 1973 we would be required to base our reimbursement agreement on the three size package categories."

On December 17, 1971, GSA notified the Postal Service of the amount which it claimed it owed for Fiscal Year 1972 general mailings, based on mail samplings in March and September of 1971. By letter of January 7, 1972, the Postal Service, referring specifically to the small package rate reimbursement agreement, informed GSA that the three size categories concept was to be implemented initially in Fiscal Year 1972, not in Fiscal Year 1973. In addition, the Postal Service suggested that GSA was computing its fiscal year package mailings incorrectly:

"We note that you use March and September tests of a given calendar year to project the volume and budget amount for the Fiscal Year ending on the subsequent June 30th. It is further noted that the initial estimate is not updated for actual by the subsequent sampling in the following March. Accordingly, your sample base is six months behind. We believe that you should use the March and September samples falling within a given Fiscal Year as the sample base for determining the actual volume."

In its March 10, 1973, letter to our Office, GSA contends that it has paid the Postal Service all that it owes for package mailing services provided in Fiscal Year 1972, stating:

"\* \* \*It is the position of the General Services Administration that the Postal Service was fully reimbursed for all GSA mailings during Fiscal Year 1972 in accordance with an agreement which was approved at the beginning of the fiscal year by the Postal Service. Our agreement was a renewal

of the same type of agreement we had been using in the years immediately preceding Fiscal Year 1972 and the postal revenue officer that GSA had been dealing with gave us assurances that our proposed agreement was acceptable. After the Postal Reorganization Act became effective on July 1, 1971, our review of the Postal Service's July 6, 1971, letter of instructions to agencies gave us no reason to believe that our agreement was not acceptable. When the Postal Service notified us, more than halfway through the fiscal year, that terms other than those contained in our agreement were to be applicable, we complied to the maximum extent possible by using the three size categories for packages in our March 1972, sampling for general mailings. From this it may be clearly seen that in Fiscal Year 1972, GSA's reimbursement to the Postal Service was based squarely on our reimbursement agreement as originally proposed and accepted."

In addition, GSA argues that even if it is liable to the Postal Service, the \$2,037,464 figure which the Postal Service has presented was incorrectly computed:

"It was not until the Postal Service's letter of January 7, 1972, that it was unambiguously stated that our reimbursements for Fiscal Year 1972 would be required to reflect the three package size categories. Additionally, the Postal Service requested that package mailing costs for Fiscal Year 1972 be computed solely on the basis of samplings taken during that fiscal year. By this time more than halfway into the fiscal year, it was virtually impossible for us to compute our package mailing costs for the entire fiscal year on the basis of the three size categories. We were, however, able to comply with the three size category sampling requirements with respect to our general mailings in a sampling taken in March 1972, and this information was furnished to the Postal Service although we did not use it to compute our reimbursement. Although it was impractical to sample the much larger Federal Supply Service package mailings using the three size categories, we were able to do our normal sampling of these

mailings in April 1972, and be able to comply with the request of the Postal Service that the reimbursement computations be based on samplings taken during that fiscal year.

"The Postal Service contends that it has computed the amount of the claim it is now asserting by applying the rates applicable to the three package sizes to the figures contained in the samplings supplied by GSA for Fiscal Year 1972. As we have pointed out, only the sampling for the general mailings was conducted using the three size categories. The package mailings of the Federal Supply Service were not sampled using the three size categories and the reimbursement for all mailings was computed by using the long established and agreed upon small package rate and the figures obtained in our Fiscal Year 1972 samplings.

"The Postal Service, in arriving at the sum they now contend is due them, applied the percentages of different package sizes which our sampling showed to exist in the general mailings to the gross number of packages mailed by our Federal Supply Service. This obviously has no more validity than picking percentages at random. There is nothing to suggest that the percentages of different sized packages mailed by the Federal Supply Service were exactly the same as those in the general mailings and it is obvious that the Postal Service used these figures solely because they were the only ones they had. \* \* \*

The Postal Service, on the other hand, argues both that it was underpaid by GSA for Fiscal Year 1972 package mailings and that the \$2,037,464 which they claim is owed is as accurate and reasonable a figure as can be computed. The Postal Service makes two arguments in support of its contention that GSA remains indebted to the Postal Service for Fiscal Year 1972 services. Basically the Postal Service contends that the enactment of the Postal Reorganization Act precluded the acceptance of a sum less than the actual amount due for mailing services rendered in Fiscal Year 1972. The Postal Service argues that the enactment of the Postal Reorganization Act fundamentally altered the relationships between the Postal Service and Government agencies which were eligible to receive penalty mail service:

"When a government agency failed to pay its full postage bills prior to enactment of the Postal Reorganization Act, the true cost of operating that agency was understated, and the Post Office Department's operating costs and apparent inefficiency would be overstated. However, the overall cost to the Government and thus to the real party in interest, the Federal taxpayer, would be the same. As a result there apparently was not any great institutional incentive within either the executive or legislative arms of the Government to enforce the reimbursement provisions of the penalty mail laws according to their terms. By the enactment of the Postal Reorganization Act, however, the institutional relationships within the Government were changed fundamentally, even though the penalty mail laws remained basically the same. The Act restructured the postal system so as ultimately to charge most costs of postal operations to users of postal services, rather than to the Federal taxpayer. If an executive agency were permitted to refuse to pay for the costs of all the services involved in handling its mail, without a positive authorization of law to do so, then the statutory plan embodied in the Postal Reorganization Act would be wholly frustrated, since the costs would have to be charged either to the postal customer or to postal appropriations, thereby unjustly overcharging the customer, contrary to 39 U.S.C. 403(c), 3622(b)(3), and misleading everyone, Congress and the public, as to the actual economic efficiency of the management of the postal system. Moreover, such unilateral action by an executive agency would also frustrate the normal legislative oversight conducted by the appropriate appropriations committees with respect to that agency, since some of the expense of that agency's operations would be concealed in the postal budget, beyond the usual legislative review. We cannot agree that there can be any legal basis for such unilateral activity by an executive agency, except a positive and explicit authorization of law enacted by a subsequent Congress."

Because of the basic changes in its structure, the Postal Service argues, "it would be impossible for us to continue the set of informal agreements that [had] governed our business affairs \* \* \*" before the effective date of the Postal Reorganization Act.

The Postal Service also argues that even if the postal revenue officer with whom GSA had dealt had in fact given GSA "verbal assurances" of the continuing operability of the small package rate reimbursement agreement through Fiscal Year 1972, the agreement would be unenforceable. The Postal Service cites Federal Crop Insurance Corp. v. Merrill et al., 332 U.S. 380 (1947), a leading case dealing with the Government's contractual liability for the unauthorized acts of its agents, wherein the Supreme Court stated:

"\* \* \* anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority. \* \* \*"  
332 U.S. at 384.

We believe it is clear, as the Postal Service suggests, that 39 U.S.C. § 3206(a), supra, which requires Government agencies to transfer to the Postal Service "the equivalent amount of postage due, as determined by the Postal Service" for penalty mail, contemplates that amounts so transferred will reasonably approximate the actual value of penalty mail used. This current requirement does not seem to differ in substance from that applicable under the predecessor Post Office Department, although considerations then existing justified greater flexibility in ascertaining the degree of equivalency required. Cf., 36 Comp. Gen. 352, supra, at 355. In any event, we also agree with the Postal Service that the basic thrust and purposes of the Postal Reorganization Act in effect strengthen the equivalency requirement. See, e.g., 39 U.S.C. §§ 101(d), 403(c), 3622(b)(3)(1970); H.R. Rep. No. 91-1104, 16-17 (1970). We believe it is equally clear that the arrangement between GSA and the former Post Office Department, whereby the "small package rate" was applied to all GSA package mailings, did not even purport to reflect the actual value of penalty mail used.



We do not understand GSA to dispute the foregoing observations. Rather, GSA's basic argument is that it had an agreement with the Postal Service to provide reimbursement exclusively at the small package rate for fiscal year 1972, so that the latter represented in effect the equivalent amount "as determined by the Postal Service." However, GSA's contention must, in our view, be rejected for two reasons. First, for the reasons stated above, it appears to us that the Postal Service would lack authority to extend under the Postal Reorganization Act an agreement inconsistent on its face with the equivalency requirement. Second, the record before us simply fails to support a clear "meeting of the minds" requisite to the agreement alleged by GSA. Although GSA requested a renewal of the small package rate reimbursement agreement on June 17, 1971, by GSA's own admission the Postal Service never specifically referred to that request until January 7, 1972, at which time the request was rejected. We can not hold that the Postal Service committed itself to a renewal of the reimbursement agreement simply because it did not reject GSA's renewal proposal sooner. Moreover, GSA's reliance on a postal officer's verbal assurance of the continuing operation of the agreement is legally misplaced in view of the rule in the Merrill case, supra.

With respect to the amount due, the Postal Service alleges that GSA is indebted to it for \$2,037,404, a figure which it calculated by applying the percentages of different package sizes based on the March 1972 GSA general package sampling to the gross number of packages mailed during fiscal year 1972. The claim is composed of two figures: \$142,666 for GSA's general mailings and \$1,894,798 for Federal Supply Service mailings. GSA objects to the method which the Postal Service used in its computations, arguing that the Postal Service's use of the percentages of the three different size packages from the March 1972 general mailings sampling in figuring the amount due for package mailings for the entire fiscal year was improper. The GSA states that this procedure "\* \* \* has no more validity than picking percentages at random. There is nothing to suggest that the percentages of different sized packages mailed by the Federal Supply Service were exactly the same as those in the general mailings \* \* \*."

While the basic approach of estimating the equivalent value of penalty mail remains appropriate under the Postal Reorganization Act, we believe, as stated previously, that the equivalency concept requires reimbursement in an amount reasonably calculated to approximate the actual value of penalty mail used. Any lesser standard would effectively result in the provision of an unauthorized subsidy

by the Postal Service. Conversely, an unreasonably high reimbursement amount would afford an unauthorized subsidy to the Postal Service. In the instant case, while the Postal Service's method of computing the additional amount due from GSA is far from precise, it does have a rational basis. Moreover, due to the misunderstanding between the parties, it constitutes the only method available to it, as indicated by the record before us. GSA has failed to offer a more realistic computation, and certainly such failure cannot excuse its liability. Accordingly, in the absence of any other basis, we must accept the Postal Service calculation of the claim at \$2,037,464.

In sum, it is our opinion that GSA is indebted to the Postal Service in the amount stated, representing the remainder of the equivalent value of penalty mail used during fiscal year 1972. GSA indicates that the appropriations chargeable are the General Supply Fund, 47 x 4530, for the Federal Supply Service mailings portion of the claim, and the Administrative Operations Fund, 257.2.21510.274, for the general mailings portion.

R.F. KELLER

Deputy Comptroller General  
of the United States